S. MARIAPPAN

v.

THE GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[CIVIL SUIT NO. 60 OF 1973]
9 APRIL 1982

ADMINISTRATIVE LAW: *Dismissal of clerical officer - Disciplinary proceedings for misconduct - Failing to bank in collection within prescribed time - Charge of CBT withdrawn by Public Prosecutor - Whether acquittal in a Criminal Court bars subsequent disciplinary proceedings - Similarity in amount - Whether any violation.*

ADMINISTRATIVE LAW: *Treasury Instruction 78(a) Public Officers (Conduct and Discipline) (General Order Chapter D) Regulations 1969 - Regulations 3(G), 30(4) (5), 33.*

ADMINISTRATIVE LAW: *Federal Constitution, art. 132 paragraph (a)-(h) clause (1), 135(2), 144(1).*

The plaintiff was at all material times a clerk in charge of the telegraph office, Alor Star employed in the permanent pensionable service of the defendant. He was dismissed from the service by the PSC (w.e.f. 26 August 1972) on the ground that he had failed to comply with the Treasury Instruction pertaining to the sum of RM5,076.63 between 27 December 1969 and 2 January 1970.

On 27 March 1970, the plaintiff was interdicted on being charged for CBT of RM5,076.63 between 27 December 1969 and 2 January 1970 under s. 408 Penal Code which was however withdrawn by the Public Prosecutor on 20 June 1971 and the plaintiff was accordingly acquitted and discharged. The plaintiff filed this suit claiming that his dismissal was wrongful and claimed, *inter alia* for a declaration that the PSC had acted contrary to the rules of natural justice and Regulation. *Najar Singh v. Government of Malaysia & Anor.* [1976] 1 MLJ 203 at p. 205 33 of the Public Officers (Conduct & Discipline) (General Order, Cap. D) reg. 1969; that his dismissal is wrongful, illegal, and that the PSC reinstate him in the service and restore all his rights and privileges.

Held:

[1] The disciplinary proceedings against the plaintiff is not illegal or unlawful by reason of the provisions of reg. 33 G.O. Chap. D, notwithstanding the acquittal of the plaintiff on a charge of CBT as the ground of the disciplinary proceedings is entirely different from the ground arising out of his conduct in the criminal charge.

[2] The plaintiff has failed to discharge his burden of proof that the PSC has failed to satisfy that he did not know the nature of the accusation made; that he was not given an opportunity to state his case; and that the PSC did not act in good faith.

[3] Since the facts before the PSC did not require further clarification pursuant to reg. 30(5), it was entitled to dismiss the plaintiff under reg. 30(4) when it found the representations furnished by him in his replies failed to exculpate him of the charge.

[4] Having considered all the documents in the agreed bundle of documents and the written submissions, the plea by the plaintiff that there was a denial of natural justice must be rejected. Similarly, there is not a scrap of evidence that the PSC had acted *mala fide.*

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Mohamed Yusoff bin Samadi v. Attorney-General [1975] 1 MLJ 1
B. Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] MLJ 169
Byrne & Anor. v. Kinematograph Renters Society Ltd. & Ors. [1958] All ER 579
Najar Singh v. Government of Malaysia & Anor. [1976] 1 MLJ 203

Legislation referred to:
Public Officers (Conduct and Discipline) (General Order Chapter D) Regulations 1969, regs. 3(g), 30(4), (5), 33
Federal Constitution, arts. 132 clause(1) paras. (a)-(h), 135(2), 144(1)

For the plaintiff - A. Jayadeva & Karpal Singh
For the defendant - Zaleha bt. Zahari, Federal Counsel

JUDGMENT

Mohd. Azmi J:

The facts leading to this action may be summarised as follows. The plaintiff was at all material times employed in the permanent pensionable service of the Government of Malaysia, attached to the telecommunication department, Alor Setar, as a clerical officer until he was dismissed from the service by the Public Services Commission (PSC for short) by order made on 7 August 1972, effective from date of service which was 26 August the same year. The dismissal was made on the ground that he had failed to comply with Treasury Instruction 78(a) which requires daily collection to be deposited within a prescribed time in a local bank, where the amount exceeds RM500 in the case of currency notes and coins, and RM2,000 where the collection includes cheques and postal orders in addition to cash. The PSC found that he had not complied with the Treasury Instruction pertaining to the sum of RM5,076.63 from a total collection of RM16,998.04 for period between 27 December 1969 to 2 January 1970. (See Exhibits AB7; AB11-12; AB15 and AB23). The plaintiff claims that his dismissal is wrongful and claims, *inter alia*, for a declaration that the decision of the PSC was made contrary to the rules of natural justice and reg. 33 of the Public Officers (Conduct and Discipline) (General Order, Chapter D) Regulations 1969; a declaration that his dismissal is wrongful, illegal, and that the PSC reinstating him in the service of the Telecommunication Department and restores all his right and privileges.

From written submissions made by Counsel for both parties, the first issue to be determined is on the applicability of reg. 33 of the Public Officers (Conduct and Discipline) (General Order, Chapter D) Regulations 1969 - hereinafter referred to as "G.O. Cap. D". Regulation 33 provides:

> An officer who is acquitted shall not be dismissed on the charge upon which he is acquitted but nothing in this General Order shall prevent disciplinary action from being taken against the officer on any other grounds arising out of his conduct in the matter: Provided that the said grounds do not raise substantially the same issues as that on which he is acquitted.

In this case, it is common ground on 27 March 1970, the plaintiff was interdicted on being charged for criminal breach of trust under s. 408 Penal Code vide Sessions Court Alor Setar arrest case no. 23 of 1970. In that criminal proceedings, he was alleged to have committed criminal breach of trust of RM5,076.63 between 27 December 1969 and 2 January 1970 in his capacity as a clerk employed as officer in charge of telegraph office in the telecommunication department, Alor Setar. (See Exhibit AB2). The charge of CBT was however withdrawn by the Public Prosecutor on 20 June 1971, and the plaintiff was accordingly acquitted and discharged without any testimony being recorded. It is submitted on behalf of the plaintiff that if the grounds raise in the disciplinary proceedings are substantially the same issues as that in the criminal charge, then PSC has no power to dismiss the plaintiff. It is argued that

in reg. 33 the material words are other grounds arising out of his conduct in the matter. "Other grounds" mean different grounds and that the different grounds do not raise substantially the same issues as that on which he is acquitted. Although the facts in *Mohamed Yusoff bin Samadi v. Attorney-General* [1975] 1 MLJ 1 are different from this case. I agree with the general principle laid down, as indeed provided by reg. 33 itself, that an acquittal in a Criminal Court does not bar subsequent disciplinary proceedings. This general principle is subject however to two prerequisites. The disciplinary proceedings must not be on the same ground arising out of his conduct in the charge, and, secondly, the ground in the disciplinary proceedings does not raise substantially the same issues as that on which he is acquitted. On the facts, it is my finding that the ground of the disciplinary proceedings is entirely different from the ground arising out of his conduct in the criminal charge. In the first place, the charge against the plaintiff before the PSC is for misconduct in failing to comply with Treasury Instruction 78(a); and by such conduct, he has committed a breach of reg. (g) which requires that "an officer shall be honest and shall not conduct himself in such a manner as to lay himself open to suspicion of dishonesty"; whereas in the criminal proceedings he was alleged by the Public Prosecutor to have committed criminal breach of trust on the sum of RM5,076.63 which is entirely different from failure to deposit the said sum in the bank within the period prescribed by the Treasury instruction. Nor are the issues the same. No issue had in fact been raised or decided in the criminal proceedings as the trial never got off the ground when the charge was withdrawn. A criminal charge can be withdrawn by the Public Prosecutor on numerous grounds, and there is no evidence on what issue or issues the Public Prosecutor was satisfied to move him to withdraw the charge. The only real similarity is the figure of RM5,076.63 being part of the plaintiff's total collection between 27 December 1969 and 2 January 1970. In the circumstances of the present case, I hold that the disciplinary proceedings against the plaintiff is not illegal or unlawful by reason of the provisions of reg. 33 G.O. Cap. D, notwithstanding the acquittal of the plaintiff on a charge of criminal breach of trust.

The next issue to be considered is whether the PSC has violated the rule of natural justice by a failure to give the plaintiff a reasonable opportunity to be heard. As correctly submitted by learned counsel for the plaintiff, this Court is not concerned with the question whether on the facts alleged, the PSC was entitled to dismiss the plaintiff. The PSC is clearly vested with these powers under Article 144(1) of the Federal Constitution. In this case, the Court is only concerned with the procedure adopted by the PSC and whether it had compiled with Article 135(2) of the Constitution which prohibits a member of any of the services mentioned in paras. (a) to (h) of Clause (1) of Article 132 to be dismissed or reduced in rank without being given a reasonable opportunity of being heard. In my view, the plaintiff is not seriously complaining on the absence of opportunity to be heard, but rather on the failure of the PSC to supply him with certain information or comments made by certain people, particularly the comments made by Mr. A. Kandiah on behalf of the director of telecoms (service section) in his letter dated 5 February 1972 (Exhibit AB18). The PSC had given the plaintiff the opportunity to show cause twice vide its letters dated 11 January 1972 (AB15) and 10 June 1972 (AB20). In response to the first show-cause letter, the plaintiff's reply (AB17) contains two main explanations to exculpate himself. Firstly, he said he could prove the sum of RM5,076.63 out of the collection of RM16,988.04 had been banked daily without any shortage and he said this could be vouched and verified from the department's bank statement for that period. He reiterated the same reply in the second opportunity to show cause (see AB22). But he did not explain why the bank statement (Exhibit D3) shows a deposit of RM24,477.52, which is far in excess of actual collection of RM16,988.04 for that period. Pausing here for a moment, it is never alleged by the plaintiff in his pleading that he did not understand the

charge brought against him in the disciplinary proceedings. He seemed to think that all he needed to do to exculpate himself from the charge is to prove that the whole sum of RM16,988.04 had been paid to the bank. As stated earlier, the requirement of Treasury Instruction 78(a) is for him, as the collecting officer, to deposit the money received daily exceeding a prescribed sum on the same day or, in case of late payments, the next day; and, in the case of cheques, they should be deposited within one week. The bank statement (Exhibit D3) is not in his favour. The excess deposit over total collection of RM16,988.04 for that particular period is sufficient for the PSC to find him guilty under reg. 3(g) G.O. Cap. D. The fact that a greater amount was credited than collected during that period is indicative of the plaintiff's failure to comply with Treasury Instruction and that the excess amount could only represent the collection of an earlier period. It is a case of continuous breach of Treasury Instruction 78(a) by depositing money collected previously to cover current daily collections. Hence, the reason for the plaintiff remitting the sum of RM5,076.63 directly to the director of telecoms on 22 July 1970, fifteen days after he was interdicted, as stated in para. 2 of Mr. Kandiah's letter (AB18). Now, to go back to the plaintiff's complaint that the rule of natural justice had been violated merely because copies of the letter (Ex.AB18), bank statement and statements recorded by the police were not furnished to enable him to have a fair opportunity to explain or contradict them sounds hollow, having regard to the circumstances of this case. The principle of reasonable opportunity of being heard as expounded by the Privy Council in *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] MLJ 169 has been cited in support of plaintiff's case. But that case is distinguishable on the facts, in that the report of the board of inquiry was not made available to the appellant/plaintiff. In this case, it cannot be said that the plaintiff was in darkness about the payment made by himself after his interdiction. This fact has not even been denied before me in this case and I cannot see in what way the plaintiff could be denied of any right when that fact was already or ought to be within his knowledge. As regards the bank statement and police statements, I also fail to see the merit of the argument that the PSC should be found guilty of violating the rule of natural justice by its failure to supply them to the plaintiff. These documents are necessary to enable the PSC to make a decision whether to charge the plaintiff and the documents are in the nature of inter-departmental communication and papers. Further, the charge against the plaintiff was a simple one and I am satisfied that he knew all the facts necessary to enable him to answer the charge. In my view, he should blame himself for failing to exculpate himself of the charge.

In the final analysis, it is for the plaintiff to prove on balance of probabilities that the rule of natural justice had been violated. In *Byrne & Anor. v. Kinematograph Renters Society Ltd. & Ors.* [1958] All ER 579 , a case relied upon by Counsel for both parties, it was held that there are rules of natural justice to be observed by quasi-judicial bodies like the PSC. At p. 599, Harman J said:

> What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more.

In my view, the plaintiff has failed to discharge his burden of proof that the PSC has failed to satisfy any of these three rules. The charge is sufficiently clear in Exhibit AB15 and AB20 that it had reference to Treasury Instruction 78(a) and reg. 3(g) G.O. Cap. D. The conduct of the plaintiff in remitting the money 15 days after his interdiction did not constitute the charge, but it formed the evidence supporting the charge which the plaintiff already knew or ought to have known. The PSC had given him two full opportunities to exculpate himself in writing.

There is no law to say that the reasonable opportunity to be given must be oral unless the circumstances of the case are such that it would be impossible for the tribunal to reach a fair decision without hearing verbal explanation. Thus, in *Najar Singh v. Government of Malaysia & Anor.* [1976] 1 MLJ 203 at p. 205, the Privy Council held:

> The word 'heard' does not invariable connote an oral hearing. It can be used and is not infrequently used in relation to something written. The question, 'Have you heard from X', often means, 'Have you had a letter from X?'. Its meaning must depend on the context in which it is used.
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> ..... Regulation 27 has to be read with reg. 30 and that makes no provision for an oral hearing if the officer fails to make representations in writing or the representations he makes in writing do not exculpate him. It is only if a Committee of Inquiry is appointed that he will be given the opportunity of giving oral evidence.
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> ..... What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed.

Under reg. 30(5), the PSC as a disciplinary authority may appoint a committee of inquiry where it considers that the case against the officer requires further clarification. The power to appoint such committee is clearly discretionary and not mandatory. Since the fact before the PSC did not require further clarification, it was entitled to dismiss the plaintiff under reg. 30(4) when it found the representations furnished by him in Exhibit AB17 and AB22 failed to exculpate him of the charge.

Having considered all the documents in the agreed bundle of documents and the written submissions, I find the plea by the plaintiff that there was a denial of natural justice must be rejected. Similarly, there is not a scrap of evidence that the PSC had acted *mala fide*.

In the circumstances, I dismiss the plaintiff's claim with costs.

Also found at [1982] CLJ 430